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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

IN RE: MIDLAND INDUSTRIAL SERVICE CORP.,
Debtor

✣

MIDLAND CENTRAL APPRAISAL DISTRICT,
Petitioner,

v.

MIDLAND INDUSTRIAL SERVICE CORPORATION, ET AL.,
Respondents,

On Application for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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63 pp

QUESTIONS PRESENTED FOR REVIEW

QUESTION NO. 1: If a bankruptcy petition is filed prior to October 1 of a given year, and that bankrupt estate owns property subject to ad valorem taxation in Texas for the year of filing, is the claim of the Texas taxing jurisdiction against the bankrupt estate entitled to priority as an administrative expense?

PARTIES TO PROCEEDING

PETITIONER:

Petitioner is Midland Central Appraisal District acting on behalf of itself and as tax collecting agency of the City of Midland, Midland Independent School District, Midland County Hospital District, and Midland College District. The address of Midland Central Appraisal District is 4631 Andrews Highway, Midland, Texas 79703. The Petitioner is represented by the firm of McCreary, Veselka, Bragg & Allen, P.C., 5929 Balcones Drive, Suite 200, Austin, Texas 78731, (512) 451-9000.

RESPONDENTS:

The Respondents are Midland Industrial Service Corporation, Debtor, Tom Harrell & Company, and Robert R. Truitt, Jr., all of the Respondents are represented by Robert R. Truitt, Jr., 901 West Texas, Midland, Texas 79702.

OTHER INTERESTED PARTIES:

Other parties which have an interest in this litigation, specifically in the distribution of the estate include:

Randolph N. Osherow, Trustee
7701 Broadway, Ste. 204
San Antonio, Texas 78209

United States Trustee
P.O. Box 1539
San Antonio, Texas 78295-1539

First City, Texas, N.A.
Represented by David P. Benjamin
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City of Midland
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Midland, Texas 79702

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DECISIONS OF LOWER COURTS

The bankruptcy court rendered its opinion denying the 1988 ad valorem tax claim of Midland Central Appraisal District in an unpublished order signed October 23, 1991. The order is reproduced in the Appendix, p. 43. The bankruptcy court also issued findings of fact and conclusions of law, likewise unpublished, and also dated October 23, 1991. The findings of fact and conclusions of law are reproduced in the Appendix, p. 45.

The United States District Court, Western District of Texas, the Honorable Lucius D. Bunton, III presiding, affirmed the bankruptcy court decision in an unpublished order dated January 18, 1993. The order of the district court is reproduced in the Appendix, p. 48.

The United States Court of Appeals for the Fifth Circuit affirmed the decision of the district court in an opinion published at 35 F.3d 164 (5th Cir. 1994) and styled *Midland Central Appraisal District v. Midland Industrial Service Corporation*. The decision was filed on September 30, 1994. The text of the opinion is reproduced in the Appendix, p. 37.

GROUNDS OF JURISDICTION

The decision of the United States Court of Appeal for the Fifth Circuit herein was rendered on September 30, 1994. No application for rehearing was filed. This Court has jurisdiction to grant review by writ of certiorari pursuant to 28 U.S.C. § 1254(1). This matter involves a federal question inasmuch as it concerns the construction of the United States Bankruptcy Code, thus giving the lower courts jurisdiction pursuant to 28 U.S.C. §§ 1331, 1334. This court further has discretionary authority to review this case pursuant to the Rules of the Supreme Court of the United States, Rule 10.1(a) inasmuch as a conflict between circuits on the issue presented exists. Note *Midland Central Appraisal District v. Midland Industrial Service Corporation*, 35 F.3d 164 164 (5th Cir. 1994) and *Forsyth County et al. v. Burns*, 21 C.B.C. 1337 (4th Cir. 1989). The court further has discretionary authority to review this case under Subsection (c) inasmuch as an important question of federal law, namely the construction of 11 U.S.C. § 503(b)(1) and other related statutes, exist significantly impacting the tax collection efforts and fiscal integrity of local governments.

STATUTORY PROVISIONS SUBJECT TO CONSTRUCTION

11 U.S.C. § 503(b)(1)

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including—

(1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case;

(B) any tax—

(i) incurred by the estate, except a tax of a kind specified in section 507(a)(8) of this title; or

(ii) attributable to an excessive allowance of a tentative carryback adjustment that the estate received, whether the taxable year to which such adjustment relates ended before or after the commencement of the case; and

(C) any fine, penalty, or reduction in credit relating to a tax of a kind specified in subparagraph (B) of this paragraph;

11 U.S.C. § 507(a)(8)(B)

(a) The following expenses and claims have priority in the following order:

. . .

(8) Eighth, allowed unsecured claims of governmental units; only to the extent that such claims are for—

. . .

(B) property tax assessed before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition;

28 U.S.C. § 959

Trustees and receivers suable; management; State Laws

(a) Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury.

(b) Except as provided in section 1166 of title 11, a trustee, receiver or manager appointed in any case pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

28 U.S.C. § 960 Tax Liability

Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation.

TEX. PROP. TAX CODE ANN. § 31.01(a) (Vernon 1992)
Tax Bills

(a) Except as provided by Subsection (f) of this section, the assessor for each taxing unit shall prepare and mail a tax bill to each person whose name the property is listed on the tax roll or to his authorized agent. The assessor shall mail tax bills by October 1 or as soon thereafter as practicable. The assessor shall mail to the state agency or institution the tax bill

for any taxable property owned by the agency or institution. The agency or institution shall pay the taxes from funds appropriated for payment of the taxes or, if there are none, from funds appropriated for the administration of the agency or institution. The outside of the envelope in which a tax bill is sent must show the return address of the taxing unit and must contain, in all capital letters, the words "ADDRESS CORRECTION REQUESTED".

TEX. PROP. TAX CODE ANN. § 31.02(a) (Vernon 1992)
Delinquency Date

(a) Except as provided by Subsection (b) of this section and by Sections 31.03 and 31.04 of this code, taxes are due on receipt of the tax bill and are delinquent if not paid before February 1 of the year following the year in which imposed.

TEX. PROP. TAX CODE ANN. § 32.01(a) (Vernon 1992)
Tax Lien

(a) On January 1 of each year, a tax lien attaches to property to secure the payment of all taxes, penalties, and interest ultimately imposed for the year on the property, whether or not the taxes are imposed in the year the lien attaches. The lien exists in favor of each taxing unit having power to tax the property.

TEX. PROP. TAX CODE ANN. § 32.07(a) (Vernon 1992)
Personal Liability for Tax

(a) Except as provided by Subsections (b) and (c) of this section, property taxes are the personal obligation of the person who owns or acquires the property on January 1 of the year for which the tax is imposed. A

person is not relieved of the obligation because he no longer owns the property.

TEX. PROP. TAX CODE ANN. § 23.01 (Vernon 1992) Appraisals Generally (Included in Appendix, p. 60)

TEX. PROP. TAX CODE ANN. §§ 25.01 (Vernon 1992) Preparation of Appraisal Records (Included in Appendix, p. 60)

TEX. PROP. TAX CODE ANN. §§ 26.01 (Vernon 1992) Submission of rolls to Taxing Units (Included in Appendix, p. 61)

STATEMENT OF THE CASE

Prior to the filing of the bankruptcy petition, the Debtor/Respondent owned business personal property which was located within the taxing jurisdiction of of Midland CAD. (Record 71). During the course of the bankruptcy proceedings, several years of taxes were assessed on this property, but the 1988 taxes are the only taxes at issue. (Record 14 & 71). The Debtor/Respondent filed a Chapter 11 bankruptcy petition on January 14, 1988. (Record 43). The proceedings were subsequently converted to a Chapter 7 proceedings in 1989 due to the inability of the Debtor to pay worker's compensation premiums. (Record 15-16 & 71).

From January 1, 1988 and during the subsequent months of 1988, Midland Central Appraisal District (Midland CAD) began to compile lists reflecting the value of the property which would be subject to taxes for 1988, TEX. PROP. TAX CODE ANN. §§ 23. 01 et seq. (Vernon 1992). Midland CAD completed that list on or about May 15, 1988. TEX. PROP. TAX CODE ANN. § 25.01(a) (Vernon 1992), (Record 18). The process of valuation and challenges to the valuation continued to the summer of 1988, TEX. PROP. TAX CODE ANN. §§ 41.01 et seq. (Vernon 1992) (Record 18). Upon compilation of the property valuations on or about July 25, 1988, Midland CAD certified the rolls to the taxing jurisdictions, TEX. PROP. TAX CODE ANN. § 26.01 (Vernon 1992). Midland CAD then calculated the tax rate necessary to obtain funding for its constituent jurisdictions' budgets for the upcoming year. (Record 18), TEX. PROP. TAX CODE ANN. §§ 26.04, 26.09 (Vernon 1992). Once the necessary tax rate had been calculated, Midland CAD presented that information to the governing bodies of the taxing jurisdictions. (Record 18) The tax rate was then finalized by resolutions of the taxing jurisdictions' governing bodies on or about September 1, 1988. (Record 18), TEX. PROP. TAX CODE

ANN. § 26.05(a) (Vernon 1992). The Chief Appraiser or Tax Assessor-Collector then applied the tax rates set by the jurisdictions to the roll to arrive at the tax assessment on each property, TEX. PROP. TAX CODE ANN. § 26.09 (Vernon 1992). Approximately October 1, 1988, Midland CAD prepared and sent out the tax bills. (Record 18), TEX. PROP. TAX CODE ANN. § 31.01(a) (Vernon 1992). Thus, for 1988, the taxing jurisdictions represented by Midland CAD assessed ad valorem taxes October 1, 1988, which was approximately eight months after the filing of the Debtor/Respondent's Chapter 11 bankruptcy petition.

After the conversion of the case to a Chapter 7 liquidation, the Trustee liquidated the business personal property of the Debtor/Respondent. (Record 16 & 71).

FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE

This matter arose in the United States Bankruptcy Court for the Western District of Texas, Midland-Odessa Division. That court had jurisdiction pursuant to 28 U.S.C. §§ 151 et seq., 1334 inasmuch as the issues concerned the construction of federal bankruptcy laws and the administration of bankrupt estates filed pursuant to the United States Bankruptcy Code.

PETITION

ARGUMENT AND AUTHORITIES

The Petitioner, Midland Central Appraisal District, respectfully applies to the Supreme Court of the United States to grant writ of certiorari to the United States Court of Appeals for the Fifth Circuit with regard to No. 93-8067, *Midland Central Appraisal District et al. v. Midland Industrial Service Corporation, et al.* and for cause of such would show the Court as follows:

QUESTION NO. 1: If a bankruptcy petition is filed prior to October 1 of a given year, and that bankrupt estate owns property subject to ad valorem taxation in Texas for the year of filing, is the claim of the Texas taxing jurisdiction against the bankrupt estate entitled to priority as an administrative expense?

The facts in this case have never been in dispute. The only issue is a question of law.

The case presents the issue of whether ad valorem taxes in Texas for the year of the filing of a bankruptcy constitute administrative expenses in that bankruptcy. The Petitioner concedes that if the bankruptcy is filed after the tax assessment date of October 1, the taxes for that year will be pre-petition, but contends that any pre-October 1 filing will yield administrative expense taxes for that year.

The Court of Appeals for the Fifth Circuit concluded that the taxes would not qualify as administrative expenses, 35 F.2d 165 (5th Cir. 1994). The Court of Appeals for the Third Circuit recently reached the same result in *In Re Columbia Gas Transmission Corp.*, _____ F.2d _____ (No. 93-7531, October 5, 1994, 3rd Cir.) under a similar statutory scheme in West

Virginia. The Petitioner has been informed that the West Virginia State Department of Tax and Revenue intends to apply to the Supreme Court for writ of certiorari in that case as well. However, the Fourth Circuit Court of Appeals found such taxes to be administrative expenses under a very similar statutory scheme of North Carolina, *Forsyth County v. Burns*, 21 C.B.C. 1337 (4th Cir. 1989). Thus, a conflict among the circuits exists indicating review by the Supreme Court would be appropriate pursuant to Rules of the Supreme Court of the United States, Rule 10.1(a).

The importance of the tax in question being accorded administrative status is the advantage of the relative priority of those claims in 11 U.S.C. § 507(a)(1). Furthermore, administrative expense taxes receive more favorable treatment regarding penalties and interest on delinquencies pursuant to 11 U.S.C. § 503(b)(1)(B) and (C). The difference between administrative expense status and pre-petition status frequently, as in the case at bar, is the difference between recovery of the taxes and loss of those taxes. When the taxes are lost, obviously the debtor escapes taxation, disrupting equality and uniformity of taxation, and the local government is fiscally impaired. Functionally, the debtor's most recent tax delinquency is subordinated to claims for attorney fees and other claimants intended by Congress to have lessor priority.

I. Primary Cases and Statutes

The issue in this case has arisen because 11 U.S.C. § 503(b)(1)(B)(i) has two requirements in an order for an ad valorem tax to be considered an administrative expense: Section 503(b) states, "[T]here shall be allowed administrative expenses . . .including-. . .(B) any tax-(i) incurred by the estate, except a tax of a kind specified in section 507(a)(8) of this title". 11 U.S.C. § 503(b)(1)(B)(i). The two requirements are that the

tax must (1) be incurred by the bankruptcy estate, and (2) not be a § 507(a)(8) tax.

The Petitioner contends that these two requirements are actually one. Section 507(a)(8)(B) dictates that a qualifying tax be **assessed** prior to the petition in bankruptcy. Midland CAD's position is that the **assessment** date is also the date the tax is **incurred**. Thus, determination of the assessment date of Texas ad valorem taxes resolves both prongs of the § 503(b)(1)(B)(i) test. That assessment date falls on October 1st of each year, as set forth in the Statement of the Case, *supra*. The scheme for valuing property, setting a tax rate, applying that rate to the roll, and billing the taxpayers as described above is common to all Texas taxing jurisdictions and, in fact, is mandated by the Texas Property Tax Code.

The Respondents on the other hand, will urge upon the court that ad valorem taxes in Texas are incurred on January 1st of any given year, since that is when the tax lien arises and the person owning the property on that date has personal liability. TEX. PROP. TAX CODE ANN. §§ 32.01, 32.07 (Vernon 1992).

The first reported decision directly on the issue in Texas was *Davis v. LaMesa Independent School District*, 11 B.R. 621, (B.C.N.C.-Tex. 1981). In *Davis*, the court was required to determine whether 1980 ad valorem taxes were assessed post or pre-petition regarding an August 29 filing in order to determine if the taxes were dischargeable under § 523(a)(1)(A) of the Bankruptcy Code. A tax that falls within the parameters of § 507(a)(6)(B) (now § 507(a)(8)(B)) is not dischargeable. *Davis v. LaMesa Independent School District*, 11 B.R. at 622. The court held that by analyzing § 507(a)(8)(B), the determinative date for whether an ad valorem tax is pre-petition or post-petition is the date upon which the taxes were assessed, so that the meaning of the term "assessment" is determinative of the issue. *Id.* The court then examined Texas

law to discover what the term "assessment" means, and when it takes place. *Id.* The court looked to *Connell Leasing* which stated, "The word 'assessment'. . . means the sum that has been ascertained as the apportioned part of the tax to be charged . . . [and] includes the procedure on the part of the officials by which the property is listed, valued, and finally a pro rata tax is declared." *Bexar County, Texas v. Connell Leasing Co.*, 611 S.W.2d 496, 498 (Tex.Civ.App.-San Antonio 1981, no writ) (quoting *State v. Farmer*, 94 Tex. 232, 59 S.W. 541 (1900)). Thus, *Davis* concluded that under Texas law assessment occurs during September, so that the ad valorem taxes were held to be post-petition. *Id.*

Davis was followed by *In Re Fairchild Aircraft Corp.*, 124 B.R. 488, 494 (B.C.W.D.-Tex. 1991) which directly addressed the issue of whether ad valorem taxes for the year of bankruptcy were administrative or pre-petition when the Chapter 11 bankruptcy petition was filed on February 1, 1990. *In Re Fairchild* agreed with the method and rational of *Davis*, and collapsed the two requirements of § 503(b)(1)(B)(i) of the Bankruptcy Code into the test of the date of assessment. *Id.* The court concluded that since the taxes were assessed October 1st, the taxes were administrative expenses. *Id.* The court stated:

> Property taxes in Texas are assessed as of January 1st on a given year, but the assessment does not take place until October 1st of that year. The tax rate is not required to be set until September 1st of the current tax year. TEX. PROP. TAX CODE ANN. § 26.05(a) (Vernon Supp. 1990). Not until the assessor has received notice of the tax rate for the current year may it calculate the tax to be imposed on a given property. TEX. PROP. TAX CODE ANN. § 26.09 (Vernon 1982, Supp. 1990). The term 'assessed' used in § 507(a)(7)(B) [now § 507(a)(8)(B)] refers to the act of assessment rather than to the effective date of assessment. See, *Matter of*

> *Stroud Wholesale, Inc.*, 37 B.R. 735,741 (B.C.E.D.-N.C. 1984) (rev'd in part on other grounds), 47 B. R. 999 (B.C.E.D.-N.C. 1985). Taxes assessed post-petition are therefore obligations of the estate falling under the express provision of § 503(b)(1)(B), which are first priority claims under § 507(a)(1). *Id.*; 11 U.S.C. §§ 503(b)(1)(B)(ii), 507(a)(1). [court cite should be 11 U.S.C. § 503(b)(1)(B)(i)]

In Re Fairchild Aircraft Corporation, 124 B.R. at 494. Thus, the court concluded that since the bankruptcy was filed on February 1st, and assessment occurs October 1st, that the ad valorem taxes were post-petition administrative expenses. *Id.*

In Re Pioneer Title Building, 133 B.R. 822, 824 (B.C.W.D.-Tex. 1991), followed the rational of *In Re Fairchild*. In *Pioneer Title* a Chapter 11 bankruptcy was filed on March 28, 1988. One issue was whether Travis County, Texas had a valid post-petition administrative expense tax claim on property of the Debtor which had been purchased at a foreclosure sale in 1990 by a creditor. The court stated, "There seems to be ample authority to conclude that because unpaid ad valorem taxes assessed by Travis County, Texas for the years 1988 and 1989 were assessed post-petition . . . they are entitled to Chapter 11 administrative expense status under 11 U.S.C. § 503(b)(1)(B)(i) and § 507(a)(1) . . .". *In Re Pioneer Title Building, Ltd.*, 133 B.R. at 824.

In Re Thurmond, No. 90-40163A (B.C.E.D.-Tex., May 17, 1991), an unreported decision, followed the rational of *Pioneer Title* and *Davis*. The court held that taxes for the year in which the Chapter 11 bankruptcy petition was filed were post-petition administrative expenses. *In Re Thurmond*, No. 90-40163A (B.C.E.D.-Tex., May 17, 1991)(order overruling debtor's objection to claims for administrative expenses). *In Re Thurmond* specifically adopted the holding of *Davis*, and

followed *Connell Leasing* as determinative of the date when assessment takes place under Texas law. *Id.*

Another unreported decision, *In Re W.H. Mangum, Inc.; County of Comal et al. v. W.H. Mangum, Inc. et al.*, No. SA-92-CA-698, (D.C.W.D.-Tex., San Antonio, July 20, 1994) followed the rational of the *Fairchild Aircraft* case. The court held taxes for the year of a May, 1985 filing to be administrative.

As noted in some of the cases above, a tax such as the one at bar could not qualify as a priority tax under 11 U.S.C. § 507(a)(8)(B) since the tax was not assessed until after the commencement of the petition. Again, one of the requirements of an administrative tax under § 503(b)(1)(B) is that the tax not qualify under § 507(a)(8). Thus, if the assessment date is not also regarded as the date the tax is incurred, then the taxes for the year of the filing of the petition are left in the anomalous position of neither being administrative, nor priority. Thus, the taxes most proximate to the filing of a bankruptcy would be left to being simply general unsecured claims[1]. Anomalous though it may be, that is exactly the position which the court of appeal has left property taxes for the year of filing; Neither administrative nor priority. Note Court of Appeals opinion at page 3.

The court of appeals held that since the tax lien automatically attached on January 1, 1988 by operation of TEX. PROP. TAX CODE ANN. § 32.01 (Vernon 1992), the date of assessment was January 1st and, thus, the taxes are pre-petition claims. The argument overlooks the exact wording and purpose

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[1] Texas ad valorem taxes are frequently claimed as secured in bankruptcy due to the lien provisions of Texas Property Tax Code § 32.01. However, as is often the case with personal property, the Petitioner is left in an unsecured position with regard to the claim at issue before the court.

of § 32.01 which states, "On January 1st of each year, a tax lien attaches to property to secure the payment of all taxes . . . **ultimately** imposed for the year on that property whether or not the taxes are imposed in the year the lien attaches." (emphasis added) TEX. PROP. TAX CODE ANN. § 32.01 (Vernon 1992). Section 32.01 only provides for attachment of a lien to secure payment of taxes, not for the assessment of taxes which is covered in Chapter 26 of the Texas Property Tax Code. Indeed, Chapter 26 of the Texas Property Tax Code which deals with setting tax rates by September 1, is entitled "Assessment". Furthermore, § 32.07 also relied on by the court of appeals does not provide for personal liability as of January 1st, but only that the person who owned the property on January 1st has personal liability when that liability arises. Until the taxes are actually assessed, neither the tax lien of the TEX. PROP. TAX CODE ANN. § 32.01 (Vernon 1992), nor the personal liability of the TEX. PROP. TAX CODE ANN. § 32.07 (Vernon 1992) has any meaning. The lien and liability sections of the Texas Property Tax Code provide the taxing jurisdictions retroactive security only, dependent on the assessment of the tax. The jurisdiction theoretically might not assess any tax at all thereby negating the lien and personal liability. As of January 1st, no one owes any ad valorem tax for that year. *State v. Farmer*, 94 Tex. 232, 59 S.W. 541, 542-543 (1900); *Brown County Water Improvement Dist. No. 1 v. McIntosh*, 164 S.W.2d 722, 726 (Tex.Civ.App.-Eastland 1942, writ ref'd); *Hengy v. Dallas County Levee Improvement Dist. No. 6*, 233 S.W.2d 157, 161 (Tex.Civ.App.-Dallas 1950, writ ref'd n.r.e.); *White v. McGill*, 109 S.W.2d 1102, 1105 (Tex.Civ.App.-El Paso 1937, rev'd on other grounds 114 S.W.2d 860 (Tex. 1938)); *Dallas Joint Stock Land Bank of Dallas v. State*, 118 S.W.2d 941, 942-943 (Tex.Civ.App.-El Paso 1938, no writ).

It should further be noted that TEX. PROP. TAX CODE ANN. § 31.02(a) (Vernon 1992) provides that "taxes are due

on receipt of the tax bill and are delinquent if not paid before February 1 of the year following the year in which imposed." As referenced above, the tax bill is sent on or about October 1. TEX. PROP. TAX CODE ANN. § 31.01(a) (Vernon 1992). Thus, the Texas Code dictates that no tax for the current year is due as of January 1 of that year, but is rather due upon the mailing of the tax bill on or about October 1.

A trustee or debtor-in-possession should further be required to pay taxes for the year of filing as an administrative expense due to the constraints of 28 U.S.C. §§ 959, 960. Section 960 requires the trustee to pay local taxes on business he or she conducts "to the same extent as if it were conducted by an individual or corporation." Section 959(b) further requires the trustee to manage the estate "according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof." If a hypothetical owner came into ownership of taxable property after January 1, that owner would, nevertheless, be required to pay the taxes on that property for that year. Even though the new owner would not have personal liability for the taxes by virtue of TEX. PROP. TAX CODE ANN. § 32.07 (Vernon 1992), that owner would be subject to in rem suit for foreclosure of the tax lien on that property pursuant to TEX. PROP. TAX CODE ANN. §§ 33.41 et seq. (Vernon 1992) and be at peril of losing the property should the owner not pay. Few, if any, such property owners would think themselves not under compulsion to pay the tax. Thus, valid laws of the State of Texas require such an owner to pay the current year's tax. Under 28 U.S.C. § 959(b), 960, a bankruptcy trustee or debtor-in-possession is under the same compulsion to pay a current obligation against its property.

II. Administration of Bankrupt Estates

Perhaps the most compelling reason for adopting Midland CAD's position, is that it is the only workable position with regard to the administration of bankrupt estates. When ad valorem taxes are regarded as incurred and assessed at the time of their actual assessment by October 1st, there is no uncertainty about the ad valorem tax claim against the estate. However, if ad valorem taxes are regarded as incurred and assessed as of January 1st of the year, nine months before such taxes are known, then those taxes will be pre-petition claims to a subsequently filed bankruptcy even though the taxes, at the time of filing, are neither known, assessed, due, nor delinquent.

For a bankruptcy which is filed sometime after January 1st and closes or confirms before the assessment by October 1st, the taxing jurisdiction would be forced to file a claim for an amount of tax which it has not assessed and does not know. If it failed to do so, it would face its "pre-petition" tax claim being barred. Reliance on estimated claims based on prior years taxes would be imprecise at best and potentially highly inaccurate, especially in the case of personal property taxes where the value and amount of property taxed may fluctuate greatly.

Furthermore, debtors, which are widely known to be highly negligent in listing ad valorem tax jurisdiction creditors in the first place, would be highly unlikely to list ad valorem tax jurisdictions as creditors when the only tax supposedly assessed at that point would not, in fact, be assessed, known, billed, or due for as much as ten months, and not be delinquent for as much as thirteen months. (Ad valorem taxes become delinquent on February 1st of the year following the year in which they are assessed, TEX. PROP. TAX CODE ANN. § 31.02 (Vernon 1992)). Perhaps the greatest difficulty would be caused in Chapter 13 cases. A Chapter 13 bankruptcy filed on

January 2nd would have a bar date for filing proofs of claim long before the ad valorem taxes for that particular year are known. Bankruptcy Rules 2003(a) and 3002(c); 11 U.S.C § 341(a). Either the administration of the estate would have to be delayed, or the plan would later have to be amended to allow for the ad valorem taxes for the year of filing. 11 U.S.C. §§ 1322, 1329. For multi-year bankruptcies which close or confirm before October 1st, adoption of a January 1st assessment date would confuse the final year's taxes because it would make them administrative, as opposed to post-bankruptcy, though the taxes would not yet be known. The administrative difficulties imposed upon the taxing jurisdiction creditor, the debtor, and trustee are incalculable if a date other than the true assessment date for ad valorem taxes is adopted. It is in part because of the relative certainty and administrative facilitation of adopting a date certain when the ad valorem taxes are known as being the date of incurring and assessing of ad valorem taxes that Petitioner urges the court to adopt the tax billing date of October 1st, TEX. PROP. TAX CODE ANN. § 31.01 (Vernon 1992), as the incurrance date for ad valorem taxes in Texas.

III. Comparable Cases

A. Cases Supporting Petitioner's Position

The North Carolina ad valorem tax statutes are similar to the Texas statutes inasmuch as they provide for lien attachment and valuation of property as of January 1. N.C. Gen. Stat. 105-285(b)(1987). The North Carolina local governments set rates on or about July 1; the tax becomes payable by September 1. N.C. Gen. Stat. 105-360 (1987). In considering whether that tax for the year of a February 21 filing was an administrative expense the Fourth Circuit concluded that no tax was "incurred" until at least the time of the setting of rates on July 1. The Court noted that no tax is due until a rate is set and that

a jurisdiction might not set a rate at all. *Forsyth County et al v. Burns*, 21 C.B.C. 1337 (4th Cir. 1989).

Also construing North Carolina ad valorem taxes, the bankruptcy court found those for the year of filing to be administrative expenses in *Matter of Stroud Wholesale, Inc.*, 37 B.R. 735 (B.C.E.D.-N.C. 1984). The debtor filed on April 7, 1981.

Pursuant to N.Y.C. Charter § 1519, New York City real property ad valorem taxes relate to a "tax status date" of January 5 of each year. On that date, ownership and value and taxable status of the property are determined. However, the taxes are not due and payable until July 1 of the same year. With a debtor filing bankruptcy on January 27, the district court found that the property taxes for that year were administrative, being incurred after the filing of the petition. As is the case with Texas ad valorem taxes, the district court in the Southern District of New York noted that no taxes were due prior to the filing of the petition. The court further reasoned that taxes becoming due during the pendency of the operation of a business or ownership of property would reasonably be considered a legitimate expense of that business or property operation and then incurred. *R.H. Macy & Co., Inc.*, 157 B.R. 548 (B.C.S.D.-N.Y. 1993).

B. Cases Contrary to Petitioner's Position

The state of Florida has an ad valorem tax scheme similar to those of Texas and North Carolina. A lien attaches and property is valued as of January 1, Fla.-Stat. §§ 192.053, 197.042, 197.122. The rates are set in September and October, bills are sent in November, and the tax becomes delinquent in April of the next year. With regard to bankruptcies filed in August, bankruptcy courts have held the taxes for the year of filing to be pre-petition. *In Re Florida Engineered Const.*

Products, 157 B.R. 698 (B.C.M.D.-Fla. 1993); *In Re Point Restaurant and Oyster Bar*, 86 B.R. 252 (B.C.N.C.-Fla. 1988).

Under a statutory scheme factually quite different than that of Texas, but conceptually similar, West Virginia provides for valuation of utility property as of December 31. The tax does not actually become due until September of the next year when half is payable. The remaining half of the taxes are not delinquent until March of the next year. W. Va. Code §§ 11-6-1(a) and (c), 11-6-9, 11-6-10, 11-6-11, 11-16-18, 11-6-23. In July after the December 31 valuation date, a bankruptcy was initiated. The Court of Appeals for the Third Circuit found that the valuation date was the date of incurrance of the tax, *In Re Columbia Gas Transmission Corp.*,_____F.3d_____(No. 93-75, October 5, 1994, 3rd Cir.). As noted above, Petitioner understands that the West Virginia Department of Tax and Revenue intends to apply for writ of certiorari.

Two other Texas bankruptcy courts have considered the issue before the Court. One court held the tax in question to be pre-petition without significant discussion, *T & T Roofing and Sheet Metal, Inc.*, 156 B.R. 780 (B.C.N.D.-Tex. 1993). The other found the October 1 date to be the critical date but, nevertheless, prorated the tax for the year of filing between pre-petition claims and administrative expenses respective to the date of filing, *In Re 7003 Bissonette, Inc.*, 153 B.R. 455 (B.C.S.D.-Tex. 1992).

IV. Distinguishable Cases

The courts below in the case at bar committed error by choosing to follow a line of distinguishable non-Texas cases which emphasize the first prong of the test under 11 U.S.C. § 503(b)(1)(B)(i). The district court and court of appeals followed *In Re Northeastern Ohio General Hospital Associa-*

tion, 126 B.R. 513 (B.C.N.D.-Ohio 1991). The district court also relied generally upon *In Re Brent Oil Explorations, Inc.*, 91 B.R. 104 (B.C.D.-Col. 1988); and *In Re Scrap Disposal, Inc.*, 38 B.R. 765 (B.A.P.-9th Cir. 1984)[2]. All of these case can easily be factually distinguished.

All of these cases focus upon § 503(b)(1)(B)(i) of the Bankruptcy Code to determine if the tax was incurred by the estate. The *Northeastern Ohio* line of cases all follow the idea that," [A] tax claim is incurred on the date it accrues rather than the date it is assessed or becomes payable." *In Re Northeastern Ohio General Hospital Association*, 126 B.R. at 515. The flaw in this statement is that a tax could just as easily be incurred by the estate when it is assessed. There is nothing that requires that the date of accrual to be determinative of when the tax is incurred. Also, by using the date of accrual, the *Northeastern Ohio* view requires a two step inquiry to be made with results which could vary greatly depending on the type of tax at issue as different taxes will accrue at different times. The *Northeastern Ohio* line of cases also look to state law to determine when a tax is accrued, so that even under this line of cases, Texas law would control. Furthermore, "accrual" is not a term used in Texas ad valorem taxation. But, even if one were to decide when such taxes "accrue," the most logical conclusion would still be the October 1st assessment date, since no one owes any tax prior to that date, TEX. PROP. TAX CODE ANN. §§ 31.01(a), 31.02(a) (Vernon 1992).

In addition, *Northeastern Ohio* involved unsecured unemployment compensation taxes. *In Re Northeastern Ohio General Hospital Association*, 126 B.R. at 515. The taxes were

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[2]The citation to the bankruptcy appellate panel's decision is an error because the issue of when assessment occurs was not appealed. The correct citation should be *In Re Scrap Disposal, Inc.*, 24 B.R. 178 (B.C.S.D.-Ca. 1982), aff'd on other grounds 38 B.R. 765 (B.A.P.-9th Cir. 1984).

also based upon employee discharges which had occurred entirely pre-petition, as the debtor had ceased business operations prior to filing the bankruptcy petition. *Id.* In other words, a very different tax was in issue.

The other two cases cited by the district court are also equally distinguishable. *Brent Explorations* involved the interpretation of Wyoming tax law. Under Wyoming law, ad valorem taxes on oil production is listed and assessed on February 1st. Wyoming Statutes § 39-2-101(a)(i). The taxes at issue were not ad valorem taxes but oil production taxes, which under Wyoming law, were calculated upon the oil production for the previous year. Wyoming Statutes § 39-3-202. *In Re Brent Explorations, Inc.*, 91 B.R. at 107. The court held that since the 1983 taxes were based upon oil production for 1982, and the bankruptcy petition was filed on November 5, 1982, the taxes would be prorated so that taxes for prior to November 5th were pre-petition claims. *In Re Brent Explorations, Inc.*, 91 B.R. at 107-108. *Brent Explorations* is not only factually distinguishable due to the different statutory scheme, but also supports the idea of using state law to determine when a tax is incurred so that no blanket rule, such as the district court applied, would be applicable.

Scrap Disposal is completely distinguishable from the case at bar. Therein, the debtor filed bankruptcy on May 16, 1980. *In Re Scrap Disposal, Inc.*, 24 B.R. at 179. Thereafter, the local taxing authorities decided that a mistake had been made in the assessment of the 1978-1979 unsecured personal property taxes. *Id.* To correct that error, the taxing authority issued a supplemental bill for the 1978-1979 taxes. *Id.* That supplemental tax bill was assessed and due after the filing of the bankruptcy. *Id.* However, the court rightly held that 11 U.S.C. § 507(c) controlled. *In Re Scrap Disposal, Inc.*, 24 B.R. at 180. That section dictates that if a tax assessment is the result of an error, then the assessment is related back to the year for

which the taxes in question actually arose. The taxes at issue in *Scrap Disposal* were plainly for a pre-petition tax year. The facts of *Scrap Disposal* bear no similarity to the taxes before the court today.

Wherefore, Petitioner prays this Court grant writ of certiorari as pled for and that, upon review, it reverse the ruling of the United States Court of Appeals for the Fifth Circuit, hold that Texas ad valorem tax for the year of a pre-October 1 bankruptcy filing are administrative taxes for that year, and grant Petitioner recovery on its 1988 tax claim.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER, MIDLAND CENTRAL APPRAISAL DISTRICT, ET AL.

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED

NO. 93-8067 SEP 30 1994

CHARLES R. FULBRUGE III
CLERK

IN THE MATTER OF: MIDLAND INDUSTRIAL SERVICE CORPORATION,

Debtor.

MIDLAND CENTRAL APPRAISAL DISTRICT,
Representing the City of Midland,
Midland Independent School District,
Midland County Hospital District
and Midland College,

Appellant,

versus

MIDLAND INDUSTRIAL SERVICE CORPORATION, ET AL.,

Appellees.

Appeal from the United States District Court for the Western District of Texas

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Before GARWOOD and BARKSDALE, Circuit Judges, and SHAW, * District Judge.

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* Chief Judge of the Western District of Louisiana, sitting by designation.

GARWOOD, CIRCUIT JUDGE:

Midland Central Appraisal District (MCAD) appeals the lower courts' decisions denying its post-petition administrative expense claim for ad valorem taxes against Midland Industrial Service corporation (Appellee).[1] We affirm.

Facts and Proceedings Below

On January 14, 1988, Appellee, a Texas corporation, filed for Chapter 11 bankruptcy.[2] Prior to its bankruptcy petition, Appellee owned personal property within the taxing jurisdiction of MCAD.[3] On December 1, 1988, MCAD filed an administrative expense claim against Appellee's bankruptcy estate for 1988 ad valorem taxes on personal property of Appellee (the Taxes). Appellee objected to MCAD's claim, and the bankruptcy court held a hearing on the matter. On October 25, 1991, the bankruptcy court ruled that the Taxes were pre-petition expenses and denied MCAD's claim. On January 19, 1993, the district court issued an order affirming the bankruptcy court's decision. MCAD now appeals.

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[1] On appeal, Appellee alleged that MCAD's appeal was moot because no remedy or relief could be fashioned by this Court. As the parties, pursuant to a March 31, 1992, settlement agreement, agreed to have the trustee put the amount in controversy in an escrow account pending the outcome of MCAD's appeal, we find no merit to this argument. See *In re Commonwealth Oil refining Co.*, 805 F.2d 1175, 1181 (5th Cir. 1986) ("A case is not moot so long as any claim for relief remains viable . . . .").

[2] The proceedings were subsequently converted to a Chapter 7 petition because of Appellees' inability to pay worker's compensation.

[3] MCAD represents the taxing entities of the City of Midland, the Midland Independent School District, the Midland County Hospital District, and the Midland College District.

Discussion

The bankruptcy court's findings of fact are reviewed under the clearly erroneous standard, while conclusions of law are subject to *de novo* review. *In re Consolidated Bancshares, Inc.*, 785 F.2d 1249, 1252 (5th Cir. 1986).

I. Administrative Expenses

Section 503 of the Bankruptcy Code provides:

"After notice and a hearing, there shall be allowed, administrative expenses, . . . including-

***

(b) any tax-

(i) *incurred by the estate*, except a tax of a kind specified in section 507(a)(7) [4] of this title . . . ." 11 U.S.C. § 503(b)(1)(B)(i) (emphasis added).

A bankruptcy estate comes into existence upon the filing of a bankruptcy petition. *See, e.g., In re Anderson*, 132 B.R. 657, 659 (Bankr. M.D. Fla. 1991). In accordance with section 503(b), A claim cannot be both a pre-petition secured claim against the debtor and a post-petition administrative claim against the bankruptcy estate. Therefore, the sole issue is whether the Taxes were "incurred" before or after Appellee's January 14, 1988, bankruptcy petition.

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[4] Section 507(a) deals with the priority of expenses and claims. The applicable part of section 507(a)(7) is clause (B), which applies to property taxes "assessed before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition." 11 U.S.C. § 507(a)(7)(B). Since the Taxes were not assessed before the commencement of the case, section 507(a)(7) is not applicable.

II. Tax Liability Under Texas Law

The question of when a tax obligation arises is determined by state law. *In re Columbia Gas System, Inc.*, 146 B.R. 114, 116 (Bankr. D. Del. 1992). Under section 32.07 of the Texas Tax Code, "property taxes are the personal obligation of the person who owns or acquires the property on January 1 of the year for which the tax is imposed. [Such] person is not relieved of the obligation because he no longer owns the property." TEX. TAX CODE ANN. § 32.07. Texas law also provides that "[o]n January 1 of each year, a tax lien attaches to property to secure the payment of all taxes, penalties, and interest ultimately imposed for the year on the property, whether or not the taxes are imposed in the year the lien attaches. The lien exists in favor of each taxing unit having power to tax the property." TEX TAX CODE ANN. § 32.01 (a). Under Texas law, taxes for a particular year generally are not assessed against the taxpayer until approximately October 1 of that year.[5] *See, e.g., Shaw v. Phillips Crane & Rigging, Inc.*, 636 S.W. 2d 186, 188 (Tex. 1982) (noting tax rolls are required to be filed no later than October 1).

III. Parties' Arguments

MCAD argues that a tax is *incurred* on the date it is *assessed*. MCAD asserts that taxes are not incurred until the tax rate is set and the taxes are payable. As a result, MCAD contends

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[5] In accordance with Texas law, on or before July 25 of any given year, MCAD compiles lists reflecting the ownership and value on January 1 of that year of the property which on January 1 of that year was within MCAD and subject to taxes for that year. TEX. TAX CODE ANN. § 23.01 et seq. By July 25 of any given year, MCAD certifies the appraisal rolls to the taxing jurisdictions. TEX. TAX CODE ANN. § 26.01. Around September 1 of any given year, MCAD calculates the tax rate necessary to obtain funding for the budgets of its constituent jurisdictions. TEX. TAX CODE ANN. § 26.05(a). The tax rate is usually finalized and then assessed to the applicable properties by October 1. TEX. TAX CODE ANN. § 31.01(a).

that liability for the Taxes was incurred post-petition since the date of assessment occurred after January 14, 1988, the date the petition was filed.[6] Counter to MCAD's position, Appellee asserts that a tax is incurred on the date tax liability *accrues or attaches*. Appellee contends that in accordance with Texas law, January 1, 1988, was the date when the obligation for the Taxes was incurred, as this was the date MCAD's personal liability for the tax accrued and a lien for the tax attached to the property.

IV. Resolution of the Conflict

The term "incur" is defined as "[t]o have liabilities cast upon one by act or operation of law [or to] become liable;e or subject to." BLACK'S LAW DICTIONARY 691 (5th. ed. 1979). "[A] tax claim is incurred on the date is accrues rather than the date it is assessed or becomes payable." *In re Northeastern Ohio General Hosp. Assn*, 126 B.R. 513, 515 (Bankr. N.D. Ohio 1991).[7] A tax obligation accrues when the event that

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[6] MCAD asserts that this Court in *In re Stanford*, 826 F.2d 353 (5th Cir. 1987), implicitly ruled for its position. In *Stanford*, this Court, in a footnote, stated that the debtors "assert[ed] or conced[ed] that taxes falling due during the administration of the estate . . . are payable as expenses of the estate under 11 U.S.C. § 503(b)(1)(i)." Id. at 354 n.1. The footnote simply observed that the parties did not argue the issue; it does not, however, reflect this Court's position.

[7] In *Northeastern*, the debtor, an employer, was required by state law to pay a tax to fund the cost of providing unemployment benefits to its former employees. Employees of the debtor had been terminated prior to the bankruptcy petition, but benefits were not paid them until after the petition, and the amount debtor was to pay to fund those benefits likewise was not determined or payable until after the petition was filed. At issue was whether the obligation to fund those unemployment benefits paid to the former employees was a pre-petition or post-petition claim against the debtor. The court ruled that because the event that under local law triggered the liability, i.e. the termination of the employees, occurred pre-petition, the claim was not a post-petition administrative expense. Id. at 515.

triggers liability has occurred.[8]

Under Texas law, a property owner's liability for ad valorem taxes for any given year arises as of January 1 of that year regardless of when the tax is assessed. TEXAS TAX CODE ANN. § 32.01. Therefore, under state law, even if the amount of MCAD's claim was undetermined, its right to payment from Appellee accrued on January 1, 1988. Appellee's liability for the Taxes was "incurred" on January 1, 1988, and therefore is a pre-petition expense.

The Taxes are not administrative expenses of the estate because the events which triggered the tax liability, ownership of the property and attachment of the tax lien, occurred pre-petition. MCAD is not entitled to assert both a pre-petition secured tax lien and a post-petition administrative expense for the same tax.[9]

For the foregoing reasons, the district court's order denying MCAD's claim for the Taxes as an administrative expense is AFFIRMED.

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[8] *See, e.g., Columbia Gas System*, 146 B.R. at 118 (ruling that under local law debtor obligation to pay taxes arose not when it was assessed but "when it owned and operated property within the prior calendar year"); *Northeastern Ohio*, 126 B.R. at 515 (holding unemployment taxes accrued when employees were terminated, not when the amount of compensation taxes are determinable); *In re Brent Explorations, Inc.*, 91 B.R. 104, 107 (Bankr. D. Colo 1988) (stating that liability for oil production taxes was incurred as of date of production, rather than date of the tax assessment).

[9] MCAD did not pursue its tax lien on the property.

IN THE UNITED STATES BANKRUPTCY COURT FOR
THE WESTERN DISTRICT OF TEXAS
MIDLAND DIVISION

IN THE MATTER OF:	§	CASE NO. 88-70028
MIDLAND INDUSTRIAL	§	
SERVICE CORPORATION	§	
	§	
DEBTOR	§	CHAPTER 7

FILED
Oct 25 1991
U.S. Dist.Court
Clerk's Office
By _____ Deputy

MIDLAND INDUSTRIAL	§	
SERVICE CORPORATION,	§	
TOM HARRELL &	§	OBJECTION TO PROOF
COMPANY, AND	§	OF CLAIM OF
ROBERT R. TRUITT, JR.,	§	MIDLAND CENTRAL
P.C.	§	APPRAISAL DISTRICT
	§	CLAIMING ADMINIS
V.	§	TRATIVE CLAIM ON
	§	1988 TAXES
MIDLAND CENTRAL	§	
APPRAISAL DISTRICT	§	

ORDER ON CLAIM FOR ADMINISTRATIVE EXPENSES OF MIDLAND CENTRAL APPRAISAL DISTRICT AND OBJECTION THERETO

On the 11th day of September, 1991, came to be heard and considered the claim for administrative expense of Midland Central Appraisal District as amended and also the objection thereto by the Debtor, Robert R. Truitt, Jr., P.C., and Tom Harrell & Company. All parties appeared through counsel. Upon presentation of the evidence and arguments of counsel,

the court makes the findings of fact and conclusions of law set forth in the accompanying document and incorporated in this order as if fully set forth at length.

IT, THEREFORE, ORDERED, ADJUDGED AND DECREED by this court that the objection is sustained and that Midland Central Appraisal District shall have a administrative expense claim in the amount of $2,998.14 for tax years 1989 and 1990 on the business personal property of the Debtor; that the 1988 tax claim by Midland Central Appraisal District against the business personal property of the Debtor is held to be a pre-petition claim and thus disallowed as an administrative expense; the claim of Midland Central Appraisal District against the Debtor for taxes on a certain mobile home is disallowed.

Signed this the 23 day of October, 1991.

RONALD B. KING
UNITED STATES BANKRUPTCY JUDGE

[ISSUED Oct. 25, 1991]

IN THE UNITED STATES BANKRUPTCY COURT FOR
THE WESTERN DISTRICT OF TEXAS
MIDLAND DIVISION

FILED
Oct 25 1991
U.S. Dist. Court
Clerk's Office
By Deputy

IN THE MATTER OF:	§	CASE NO. 88-70028
MIDLAND INDUSTRIAL	§	
SERVICE CORPORATION	§	
	§	
DEBTOR	§	CHAPTER 7

MIDLAND INDUSTRIAL	§	
SERVICE CORPORATION,	§	
TOM HARRELL &	§	OBJECTION TO PROOF
COMPANY, AND	§	OF CLAIM OF
ROBERT R. TRUITT, JR.,	§	MIDLAND CENTRAL
P.C.	§	APPRAISAL DISTRICT
	§	CLAIMING ADMINIS
V.	§	TRATIVE CLAIM ON
	§	1988 TAXES
MIDLAND CENTRAL	§	
APPRAISAL DISTRICT	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Came to be heard on the 11th day of September, 1991, the claim of Midland Central Appraisal District (MCAD) for administrative expenses against the Debtor herein, the objection of the Debtor and other interested parties against the 1988 tax claim by MCAD against the Debtor for taxes on a mobile home, and the response of MCAD thereto. Upon consideration of the evidence and arguments of counsel, the court makes the following findings:

FINDINGS OF FACT

1. The petition in this case was filed by the Debtor on January 14, 1988.

2. Midland Central Appraisal District filed its original administrative expense proof of claim on December 1, 1988. That claim was finally amended on August 13, 1991.

3. The administrative expense proof of claim of Midland Central Appraisal District, as amended, claims inter alia $2,500.28 in 1988 ad-valorem taxes against the Debtor's business personal property.

4. Assets in this case are insufficient to pay all administrative expenses.

5. Midland Central Appraisal District represents the taxing entities of the City of Midland, Midland Independent School District, Midland County Hospital District, and Midland College District, collecting taxes for all of the same.

6. The mobile home against which Midland Central Appraisal District has asserted a tax claim has passed from the estate, and the court has been advised that the taxes thereon will be paid by the present owner.

CONCLUSIONS OF LAW

1. According to Tex. Prop. Tax Code § 32.01, a lien attaches to taxable property in Texas as of January 1st to secure the eventual payment of ad-valorem taxes imposed on that property in that year.

2. According to Tex. Prop. Tax Code § 32.07, the owner of taxable property in Texas as of January 1st has personal

liability for the taxes ultimately imposed on that property in that year.

3. A claim can not be both [pre-petition] secured and administrative in a bankruptcy.

4. The 1988 ad-valorem taxes assessed against the business personal property of the Debtor herein were assessed pre-petition and thus can not qualify as administrative expenses herein.

Signed this the 23rd day of October, 1991.

RONALD B. KING
UNITED STATES BANKRUPTCY JUDGE

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ATTORNEYS FOR MIDLAND INDUSTRIAL SERVICE CORPORATION, TOM HARRELL & COMPANY, and ROBERT R. TRUITT, JR., P.C.

[ISSUED Oct 25, 1991]

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

FILED

JAN 19, 1993

Charles W. Vagner, Clerk
By Deputy

IN RE:	§	
	§	
MIDLAND INDUSTRIAL SERVICE CORPORATION,	§	
	§	
Debtor.	§	MO-92-CA-018-B
	§	
MIDLAND CENTRAL APPRAISAL DISTRICT,	§	
	§	
Appellant,	§	
	§	
v.	§	
	§	
MIDLAND INDUSTRIAL SERVICE CORPORATION, TOM HARRELL & COMPANY, and ROBERT R. TRUITT, JR., P.C.,	§	
	§	
Appellees.	§	

ORDER

BEFORE THIS COURT is Midland Central Appraisal District, (hereinafter "MCAD" or "Appellant"), with its appeal of the Bankruptcy Court's Order of October 25, 1991, wherein the Court Denied MCAD's administrative expense claim for 1988 ad-valorem taxes. The Appellees, Midland Industrial Service Corporation, Tom Harrell & Company, and Robert R. Truitt, Jr., P.C., (hereinafter "Appellees"), filed a timely brief on appeal.

Upon review of both briefs, the transcript of the proceedings in the Bankruptcy Court, pleadings in the file, and applicable law, the Court finds the Order of the Bankruptcy Court is well-reasoned and is AFFIRMED.

Appellees presented an issue in their Brief, which the Court will initially and separately consider. The Court will then determine the merits of the Appellant's appeal.

> Appellees present the following issue in their Brief:
>
> As a matter of law, did the Bankruptcy Court err in find that Debtor had established excusable neglect pursuant to Bankruptcy Rule 8002(c) when it granted Debtor's Request for Extension of Time to File Notice of Appeal?

A. APPLICABLE STANDARD OF APPELLATE REVIEW

The issue presented in Appellees' brief involves a review of the Bankruptcy Court's Findings of Fact and conclusions of Law. The Findings of Fact are subject to clearly erroneous standard of review. *In the Matter of Killebrew*, 888 F.2d 1516 (5th Cir. 1989); *In re: Missionary Baptist Foundation of America*, 712 F.2d 206, 207 (5th Cir. 1983). Due regard shall be given to the opportunity of the Bankruptcy Court to judge the credibility of the witnesses. Bankruptcy Rule 8013. The same rule applies when the findings of the court below "do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 105 S.C.t 1501, 1511-12, 84 L.Ed.2d 518 (1985). "Clearly errone-

ous" has been defined by the Supreme Court to mean that "when although there is evidence to support it, the reviewing court on the entire evidence is left with a firm and definite conviction that a mistake has been committed." *United States V. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.C.t 525, 542, 92 L.Ed.2d 746 (1948).

The Bankruptcy Court's conclusions of law are subject to de novo review. *In re Consolidated Bancshares, Inc.*, 785 F.2d 1249, 1252 (5th Cir. 1986); *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1307 (5th Cir. 1985). When a proper finding of fact is based upon an improper conclusion of law, the finding of fact loses its "clearly erroneous" insulation. *Smith v. Hightower*, 693 F.2d 359 (5th Cir. 1982); *Matter of Missionary Baptist Foundation of America*, 712 F.2d 206 (5th Cir. 1983).

B. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

The issue raised by Appellees concern the right of MCAD to be before this Court on appeal. Appellees assert MCAD's appeal should be dismissed because the Notice of Appeal was not filed within the time limits established by Bankruptcy Rule 8002(a), and MCAD did not, contrary to the Bankruptcy Court's decision, establish excusable neglect pursuant to Bankruptcy Rule 8002(c).

Pursuant to Bankruptcy Rule 8002(a), MCAD had until November 5, 1991 to file its Notice of Appeal. MCAD filed its Notice of Appeal and Request for Extension on November 7, 1991. However, MCAD had previously filed a Motion to Extend Time to File Notice of Appeal on September 23, 1991, which was Dismissed as Moot because the Order sustaining the objection had not yet been signed. After considering the Debtor;'s

second Request for Extension, the Bankruptcy Court entered an Order Granting Leave to File Belated Notice of Appeal, and accepted the Debtor's Notice of Appeals filed.

Appellees filed a Motion for Reconsideration of Motion for Leave to File Belated Notice of Appeal within the twenty days prescribed by the MCAD Motion, which was subsequently heard by the Court and denied.

C. ARGUMENT

Bankruptcy Rule 8002(a) provides for a ten-day limit within which to file a Notice of Appeal of a Bankruptcy Court's decision.[1] However, extension of this deadline may be given for "excusable neglect," pursuant to Rule 8002(c).[2] MCAD filed its Notice of Appeal two days after the time limit expired. The Bankruptcy Court Granted MCAD's Motion on November 18, 1991 and gave MCAD until November 8, 1991, to file Notice of Appeal.

The ten-day mandate of Bankruptcy Rule 8002(a) is strictly construed and jurisdictional in effect. I*n re Souza*, 795

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[1] Bankruptcy rule 8002 states:

(a) Ten-day period The notice of appeal shall be filed with the clerk of the bankruptcy court within 10 days of the date of the entry of judgment, order, or decree appealed from.

[2] Rule 8002(c) Extension of time for appeal

The bankruptcy court may extend time for filing the notice of appeal by any party for a period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule. A request to extend the time for filing a notice of appeal must be made before the time for filing a notice of appeal has expired, except that a request made no more than 20 days after the expiration of the time for filing a notice of appeal has expired, may be granted upon a showing of excusable neglect if the judgment or order appealed from does not authorize the sale of any property or the obtaining of credit or the incurring of a debt under § 364 of the Code, or is not a judgment or order approving a disclosure statement, confirming a plan, dismissing a case, or converting the case to a case under another chapter of the Code.

F.2d 855, 857 (9th Cir. 1986); *Whitemere Dev. Corp. v. Township of Cherry Hill*, 786 F.2d 185, 187 (3rd Cir. 1986); *In re Dayton Cir. Ct. No. 2*, 85 Bankr. 51, 53 (Bankr. S.D. Ohio 1988. Failure to file a timely notice of appeal because of a "business-threatening circumstance" does not constitute "excusable neglect." *Allied Steel v. City of Abilene*, 909 F.2d 139, 143 (5th Cir. 1990). Preoccupation of counsel with other matters does not dispense with the necessity for compliance with the rules. *United States v. Bowen*, 310 F.2d 45 (5th Cir. 1962). the fact that a party misconstrues a rule does not raise that party's error to excusable neglect. *Campbell v. Bowlin*, 724 F.2d 484, 488 (5th Cir. 1984); *Harlan v. Greybar Elec. Co.*, 442 F.2d 425, 426 (9th Cir. 1971) (Counsel's misreading rule to allow sixty rather than thirty days in which to file notices does not show excusable neglect.). Additionally, excusable neglect is not found where the delay is caused by the attorney's oversight or busy schedule. *Vogelsang v. Patterson Dental Co.*, 904 F.2d 427, 431 (8th Cir. 1990).

A litany of cases have narrowly construed this exception. *See: In re Smith*, (38 Bankr. N.D. Ohio 1982) (Counsel unable to contact client within ten-day limit and then erroneously filed appeal in the Court of Appeals; *In re Hilliard*, 36 B.R. 80 (Bankr. S.D.N.Y. 1984) (counsel claimed that copy of order was never sent to him); *In re Zeller*, 38 B.R. 739 (Bankr. 9th Cir. 1984) (allowance of appeal filed one day late because counsel was on vacation reversed); *In re Smith*, 44 B.R. 46 (Bankr. D.N.M. 1984) (appeal filed one business day late because client could not render decision to appeal in time); *In re Tinnell Traffic Services, Inc.*, 43 B.R. 280 (Bankr. MD. Tenn. 1984) (appeal filed two days late because firm representing appellant reassigned matter to an associate unaware of time deadline; *Washington County, Broadcasting, Inc.*, 39 B.R. 77 (Bankr. D.Me. 1984) (order sent to appellants previous counsel, who belatedly forwarded it to present counsel); *In re Schmidt*, 34 B.R. 284 (Bankr. D. Minn. 1983) (appeal papers mailed in period in which

it would ordinarily have arrived at court in timely fashion, but mail was inexplicably delayed; and *In re Windflower Landholding Association, Ltd.*, 34 B.R. 4 (Bankr. M.D.Fla. 1983) (counsel was absent from office due to birth of child when order was entered and mailed to office).

"Excusable neglect is limited to an occurrence of unusual circumstances in which failure to grant an extension would result in injustice . . . ." *Parke-Chapley Const. Co. v. Cherrington*, 865 F.2d 907, 911 (7th Cir. 1989). In the case at bar, the Bankruptcy Judge Granted MCAD's request without a comment. The Record establishes MCAD had earlier filed a Notice of Appeal, which was premature and subsequently dismissed as moot. In addition, the record establishes MCAD made efforts to establish if an order had been entered. MCAD's counsel did not receive notice of the Bankruptcy Court's decision until the 10th day. Such affirmative efforts by the Debtor may reduce the level of neglect to an excusable level. *Wilson v. The Atwood Group*, 725 F.2d 255, 258 (5th Cir. 1984), *cert. dismissed*, 468 U.S. 1222 (1984). This kind of scenario is one type of situation that warrants relief in favor of the litigant. *Alamo Chemical Transp. Co. v. M/V Overseas Valdes*, 726 F.2d 1073, 1074 (5th Cir. 1984); *Allied Steel*, 909 F.2d at 143; *Vogelsang*, 904 F.2d at 431. The Debtor's reliance upon representations of court personnel regarding proper filing deadlines has also, under the appropriate circumstances, qualified as excusable neglect. *Reinsurance of America, Inc. v. Administratia*, 808 F.2d 1249, 1252 (7th Cir. 1987); *Chipser v. Kohlmeyer & Co.*, 600 F.2d 1061, 1063 (5th Cir. 1979) (Court's assurance to counsel that post-judgment motions were timely filed when in fact they were not was unique circumstance justifying allowance of untimely appeal); *Willis v. Newsome*, 747 F.2d 605, 606 (11 Cir. 1984) (excusable neglect shown where judicial action lulls one into inactivity).

Judge King was familiar with the situation and apparently believed the combination of events that occurred combined to create justifiable neglect. Considering the short period of time within which the appeal missed the deadline, this Court declines to find the Bankruptcy Judge's decision was "clearly erroneous." Accordingly, the Court will consider the merits of this appeal.

INITIAL APPEAL

JURISDICTION

Pursuant to 28 U.S.C. § 158(a), the District Courts have jurisdiction to hear appeals from final judgments, orders, and decrees and, with leave of Court, interlocutory orders and decrees of Bankruptcy Judges serving within the judicial district entered in cases referred under 28 U.S.C. § 157. The instant case is an appeal, of an order entered by the Bankruptcy Judge in a case referred to the Bankruptcy Court. This Court, therefore, has jurisdiction to hear this appeal.

ISSUES PRESENTED ON APPEAL

The following is a list of issues presented on appeal:

1. If a bankruptcy petition is filed between January 1st and October 1st where the bankruptcy estate owns property subject to ad valorem taxation in Texas for that year, is the tax claim against the bankruptcy estate entitled to priority as an administrative expense?

2. Did the Bankruptcy Court err in holding the Midland Central Appraisal District has no administrative claim for 1988?

3. If a bankruptcy petition is filed between January 1st and October 1st where the bankruptcy estate owns property subject to ad valorem taxation in Texas for that year, is the tax claim against the bankruptcy estate entitled to treatment as a secured claim?

Basically, the issues are, "Does the bankruptcy court treat ad valorem tax for the year of the filing of bankruptcy as a pre-petition claim, or is such liability to be entitled to priority as an administrative expense, which normally is allowed for claims whose genesis or origin is post-petition?

FACTUAL AND PROCEDURAL BACKGROUND

Midland Industrial Service Corporation filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code on January 14, 1988. The proceedings were subsequently converted to Chapter 7 proceedings because of an inability to pay a Workers Compensation premium in 1989. This insurance was required for the company to continue in business operations. Subsequently, as a chapter 7 proceeding, the Trustee liquidated personal property, some of which was in dispute as to whether it was secured with a lien in favor of First City National Bank, which issue was ultimately settled with certain proceeds of the disposition of the equipment being recognized as encumbered to First City National Bank and certain proceeds not being encumbered to First City National Bank and therefore remaining with the Trustee. There are pending administrative claims for:

1) Midland Central Appraisal District
2) First City National Bank
3) Tom Harrell & Company
4) Robert R. Truitt, Jr., P.C.

Prior to the filing of bankruptcy, the Debtor owned business personal property which was located within the Midland Central Appraisal District. Taxes accrued on this property on January 1st, of 1988, 1989, and 1990, however, only the claim for 1988 taxes is at issue. The claim of Midland Central Appraisal District was objected to, in part as an administrative claim, for the 1988 taxes. (In other words, the taxes for the year the petition was filed.)

Bankruptcy Judge Ronald B. King held a hearing on this matter and determined the taxes could not be treated as an administrative claim. Judge King in the Bankruptcy Court's Findings of Facts and Conclusions of Law found the following:

> 1. According to Tex. Tax Code § 32.01, a lien attaches to taxable property in Texas as of January 1st to secure the eventual payment of ad-valorem taxes imposed on that property in that year.
>
> 2. According to Tex. Tax Code § 32.01, the owner of taxable property in Texas as of January 1st has personal liability for the taxes ultimately imposed on that property in that year.
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> 3. A claim cannot be both pre-petition secured and administrative in a bankruptcy.
>
> 4. The 1988 ad-valorem taxes assessed against the business personal property of the Debtor herein were assessed pre-petition and thus cannot qualify as administrative expenses herein.

Judge King then approved the Trustee's Amended Final Report. The Trustee's Final Report was filed September 25, 1991. Midland Central Appraisal District did not appeal from the

Order on the Trustee's Final Report, instead it appealed only from the Order determining its claim.

STANDARD OF REVIEW

On appeal, this Court may affirm, modify, or reverse the Bankruptcy Judge's judgment, or remand it with further instructions. Findings of fact shall not be set aside unless clearly erroneous,[3] and conclusions of law are subject to de novo review. *Matter of Delta Towers, Ltd.*, 924 F.2d 74 (5th cir. 1991); *Matter of Consolidated Bancshares, Inc.*, 785 F.2d 1249, 1252 (5th Cir. 1986).

ARGUMENT

1. Appellant contends the 1988 ad-valorem tax of Midland Central Appraisal District is an administrative expense. Appellees argue the Bankruptcy Judge was correct in finding the 1988 ad-valorem taxes to be pre-petition and thus not qualifying as administrative expenses.

Section 503 of the Bankruptcy Code entitled "Allowance of Administrative Expenses" specifically provides in subsection (b)-

> After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including-
>
> . . .
>
> (1)(B) any tax-
>
> (i) incurred by the estate, except a tax of a kind specified in section 507(a)(7) of this title;
>
> . . .

11 U.S.C. § 503(b)(1)(B)(i). According to this section of the

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[3] 11 U.S.C. § 8013.

Bankruptcy Code the tax must be incurred by the estate . In the case at bar the Bankruptcy Court determined the tax arose pre-petition. Thus, not a tax incurred by the estate.

For purposes of administrative expense allowance, tax claim is incurred on date it accrues rather than on date it is assessed or becomes payable. *See In Re Northeastern Ohio General Hospital Association*, 126 B.R. 513, 515 (Bankr.N.D. Ohio 1991). Because the estate does not exist pre-petition, priority treatment is limited to taxes incurred post-petition. *Id. See also In re Brent Explorations, Inc.*, 91 B.R. 104, 107-08 (Bankr. D. Colo. 1988); *In re Scrap Disposal, Inc.*, 38 B.R. 765, 767 (Bankr. App. 1984).

According to Texas Property Tax Code Section 32.01, a lien attaches to taxable property in Texas as of January 1st to secure the eventual payment of ad-valorem taxes imposed on that property in that year. Further, the owner of taxable property in Texas as of January 1st has personal liability for the taxes ultimately imposed on that property in that year. Tex. Prop. Tax Code § 32.01.

In the case at bar the tax claim accrued on January 1st of 1988. It was not assessed against property of the estate, because the estate did not exist on January 1, 1988. The estate did not come into existence until the Petition was filed. The Petition was not filed until January 14, 1988. Thus, the Bankruptcy Judge properly ruled the 1988 ad-valorem taxes were assessed pre-petition and did not qualify as administrative expenses.

2. Appellant also argues their tax claim against the estate is a secured claim and should be treated as such. Appellees argue Appellant failed to preserve this issue for appeal by failing to raise it to the Bankruptcy Court. This court agrees with the

Appellees because this issue was not presented to the Bankruptcy Court nor did the Bankruptcy Court consider it in the hearing or in its Findings of Facts and Conclusions of Law, or in its Order denying the Appellants Claim for Administrative Expenses. Thus, this Court is of the opinion Appellant has waived its position to claim the 1988 taxes as a secured claim by failing to present such issue to the Bankruptcy Court.

For the foregoing reasons, IT IS ORDERED the decision of the Bankruptcy Court is AFFIRMED.

SIGNED this 18th day of January, 1993.

HONORABLE LUCIUS D. BUNTON, III
SENIOR DISTRICT JUDGE

[ISSUED Jan 19, 1993]

TEX. PROP. TAX CODE ANN. § 23.01 (Vernon 1992) Appraisals Generally.

(a) Except as otherwise provided by this chapter, all taxable property is appraised at its market value as of January 1.

(b) The market value of property shall be determined by the application of generally accepted appraisal techniques, and the same or similar appraisal techniques shall be used in appraising the same or similar kinds of property. However, each property shall be appraised based upon the individual characteristics that affect the property's market value.

TEX. PROP. TAX CODE ANN. §§ 25.01 et seq. (Vernon 1992) Preparation of Appraisal Records.

(a) By May 15 or as soon thereafter as practicable, the chief appraiser shall prepare appraisal records listing all property that is taxable in the district and stating the appraised value of each.

(b) The chief appraiser with the approval of the board of directors of the district may contract with a private appraisal firm to perform appraisal services for the district, subject to his approval. A contract for private appraisal services is void if the amount of compensation to be paid the private appraisal firm is contingent on the amount of or increase in appraised, assessed, or taxable value of property appraised by the appraisal firm.

(c) A contract for appraisal services for an appraisal district is invalid if it does not provide that copies of the appraisal, together with supporting date, must be made available to the appraisal district and such appraisals and supporting data shall be public records "Supporting data" shall not be construed to include personal notes, correspondence, working papers, though processes, or any other matters of a privileged or proprietary nature.

TEX. PROP. TAX CODE ANN. §§ 26.01 et seq. (Vernon 1992) Submission of rolls to Taxing Units.

(a) By July 25, the chief appraiser shall prepare and certify to the assessor for each taxing unit participating in the district that part of the appraisal roll for the district that lists the property taxable by the unit. The part certified to the assessor is the appraisal roll for each taxing unit and notify each unit in writing by April 1 of the form in which the roll will be provided to each unit.

(b) When a chief appraiser submits an appraisal roll for county taxes to a county assessor-collector, he also shall certify the roll to the submission of only a summary of the appraisal roll. In that even, the chief appraiser shall certify the summary in the form and manner prescribed by the comptroller's rule.

(c) The chief appraiser shall prepare and certify to the assessor for each taxing unit a listing of those properties which are taxable by that unit but which are under protest and therefore not included on the appraisal roll approved by the appraisal review board and certified by the chief appraiser. This listing shall include the appraised market value, productivity value (if applicable), and taxable value as determined by the appraisal

district and shall also include the market value, taxable value, and owner filing the protest if available. If the property owner does not claim a value and the appraised value of the property in the current year is equal to or less than its value in the preceding year, the listing shall include a reasonable estimate of the market value, taxable value, and productivity value (if applicable) that would be assigned to the property if the taxpayer's claim is upheld. If the property owner does not claim a value and the appraised value of the property is higher than its appraised value in the preceding year, the listing shall include the appraised market value, productivity value (if applicable) and taxable value of the likelihood that the appraisal review board will approve a lower appraised value for the property than its appraised value in the preceding year, the chief appraiser shall make a reasonable estimate of the taxable value that would be assigned to the property if the property owner's claim is upheld. The taxing unit shall use the lower value for calculations as prescribed in Sections 26.04 and 26.041 of this code.